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No. 347

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Petitioner,

v.

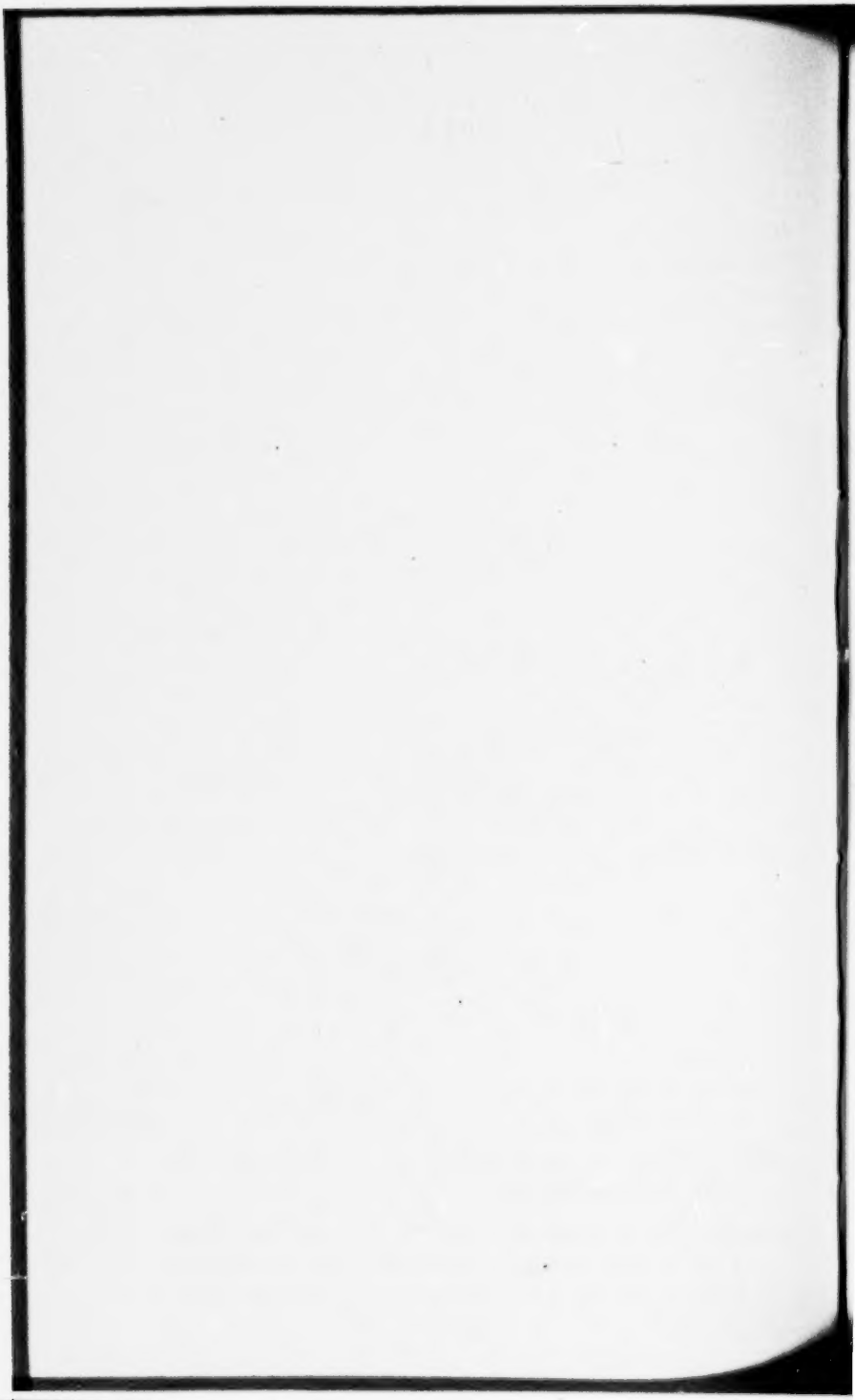
JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN THOMAS SMITH,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.



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JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

John Thomas Smith, on behalf of General Motors Acceptance Corporation, prays that a writ of certiorari issue to review the judgment entered in this case on May 14, 1947, by the United States Circuit Court of Appeals for the Second Circuit, reversing a judgment entered in the United States District Court for the Southern District of New York in favor of the petitioner for the refund of certain documentary stamp taxes.

Opinions Below.

The opinion of the Circuit Court of Appeals (R., p. 87) is reported in 161 F. 2d 593. The opinion of the District Court is reported in 60 F. Supp. 979.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered May 14, 1947 (R., p. 95). The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The time for filing this petition was extended by Mr. Justice Jackson to September 15, 1947.

Statute Involved.

Schedule A—Stamp Tax, Title VIII of the Revenue Act of 1926 (C. 27, 44 Stat. 101, as amended by Section 721 (a), C. 209, Act of June 6, 1932, 47 Stat. 272) which imposes a tax on:

> "1. Bonds of indebtedness: On all bonds, debentures or certificates of indebtedness issued by any corporation, and all instruments however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 10 cents * * *."

Question Presented.

Whether corporate instruments issued without interest coupons or registration, as evidences of indebtedness to a small group of corporate lenders, in large denominations and for their own private investment purposes, are taxable under the statute as bonds, debentures or certificates of indebtedness.

Statement.

Petitioner instituted this action for the refund of $25,000 paid under protest by it as a documentary stamp tax on $25,000,000 of instruments purporting to be promissory notes issued in 1935 without interest

coupons or registration. The salient facts pertaining to those instruments are as follows:

Pursuant to resolutions of its Board of Directors authorizing the private borrowing of approximately $30,000,000 for its business needs, petitioner issued eighty-four instruments, designated as 3¼% promissory notes, in the aggregate principal sum of $25,000,000 to five insurance companies and three other corporate lenders (R. 231-233). Allowing for differences in certain details applicable to each of the eight lenders, all of the instruments were identical as to the form, terms and privileges contained in the specimen which appears in the record (R. 19, 158, 233). These unsecured instruments ranged in face amounts from $100,000 to $1,000,000 (R. 234). Some of them were payable to the order of the designated holder, and others, consisting of a majority of them, were payable to bearer (R. 235).

The instruments were consecutively numbered for petitioner's identification of them in its own private tabulation of the details involved in the various instruments issued to each of the eight lenders (R. 160), and they bore the corporate seal. They contained provisions for acceleration and for redemption before maturity, and provided further that the petitioner would not, so long as they were outstanding, "at any time pledge or otherwise subject to a lien any of its property or assets without thereby expressly securing the due and punctual payment" of each of the instruments "equally and ratably with any and all obligations and indebtedness secured by such pledge or other lien".

Seventy-nine of the instruments were issued at intervals in the month of January 1935, while the re-

maining five were issued in June of the same year to two of the insurance companies. The maturity date of the instruments was either November 1 or December 1, 1939, or approximately two months short of five years from the date of issue, except as to seventeen of them which matured February 1, 1940, or about a month more than five years from the date of issue (R. 238, 239).

There is no provision in any of the instruments for interest coupons, and in fact none of them was issued with any interest coupons; on the contrary, each of the instruments provided for notation thereon of payment of interest (R. 237). There is no provision in any of the instruments for registration; none of them was issued in registered form, and none was in fact registered (R. 236). They were not issued under or pursuant to any trust indenture (R. 237). Each of the eight companies to whom the instruments were issued executed an agreement in which they represented that the obligations were being purchased by them for investment and not for resale or distribution to the public (R. 143). The petitioner received from the Securities Exchange Commission an expression of opinion that the instruments then proposed to be issued would not constitute a public offering and would be exempt, therefore, from any registration requirement under the Securities Act if, as was the fact, they were issued to an insubstantial number of people, which in this case turned out to be eight companies (R. 166).

Petitioner issued the instruments without paying a documentary stamp tax under Schedule A1 of the statute, on the ground that they were not taxable thereunder. The Commissioner of Internal Revenue thereafter assessed and made demand for payment

of a tax on the instruments, claiming that they were in the general class of taxable corporate securities, and subsequently disallowed and rejected the petitioner's claim for refund (R. 241-243).

Reasons for Granting the Writ.

1. The decision below is in conflict with the decisions of other lower courts, which are authority for the proposition that an essential element of the type of instruments marked for the tax under the statute is that they be issued with interest coupons or in registered form. That view of the statute controls the result reached in those cases where the instruments have, as well as where they have not, been held taxable. *Bellefield Co.* v. *Heiner,* 25 F. 2d 560; *Royal Loan Co., et al.* v. *United States,* 154 F. 2d 556; *United States* v. *American Trust & Banking Co.,* 125 F. 2d 113; *Willcuts* v. *Investors' Syndicate,* 57 F. 2d 811; *Hamilton National Bank of Chattanooga* v. *United States,* 99 F. 2d 570; *Motter* v. *Bankers Mortgage Co.,* 93 F. 2d 778; *Dauphin Deposit Trust Co.* v. *United States,* 80 F. 2d 893. The Third Circuit Court, in *Bellefield Co.* v. *Heiner, supra,* holding that instruments purporting to be notes and issued without coupons or registration were not taxable as bonds and that such conclusion was in harmony with Treasury Regulations and Decisions, emphasized that "the critical parts" of the "more or less complete definition of taxable instruments under the heading of bonds" is "that an instrument taxable as a bond must be issued by a corporation with interest coupons or in registered form". In *Royal Loan Co.* v. *United States, supra,* the Eighth Circuit Court, refusing to allow the defendant's alleged reason for

issuing the instruments involved there in registered form to relieve them from taxability as registered instruments, distinguished them from the non-taxable notes in *Bellefield Co.* v. *Heiner, supra,* because the latter were issued neither with interest coupons nor in registered form.

Those decisions indicate plainly that, where the corporate instruments have been held taxable, the tax has fallen only on instruments issued with coupons or in registered form, whether they were the mortgage participation certificates in *Hamilton National Bank* v. *United States, supra,* or the equipment trust certificates in *Lederer* v. *Fidelity Trust Co.*, 267 U. S. 17, or any other type of instruments. Until the lower court in this case, ignoring those decisions in the process of reversing the District Court, held the instruments involved here to be taxable even though they were not issued with interest coupons or in registered form, the decisions of the other lower courts had effectually established, for stamp tax purposes, a significant distinction between those corporate instruments which are and those which are not issued with coupons or in registered form. In this case the distinction is marked by the fact that, because the instruments were issued in large denominations of not less than $100,000 in any event, to a handful of lenders to be held for their own private investment purposes, they are the very antithesis of the type of instruments signified by the reference to instruments issued with coupons or in registered form.

The lower court in this case held that these instruments are taxable as debentures even though issued without coupons or registration. In so doing it recog-

nized that, for all that they contain a provision for acceleration or for redemption or prepayment or for certain credit safeguards or for a five-year term as against a shorter period, they are none the less promissory notes. However, it held them taxable, even though issued without coupons or registration, because it deemed them to be debentures, not ordinary promissory notes. In other words, instruments which would not otherwise be taxable because they are issued without coupons or registration become taxable nevertheless when, according to the court's conception, they are debentures.

Since, considered by themselves and independent of the context supplied by the remainder of the sentence, the words "bonds, debentures or certificates of indebtedness" have no defined meaning in the statute, the decisive criterion for application of the tax under the decision in this case is, not the objective standard reflected in the expressed concept of instruments "issued by any corporation with interest coupons or in registered form, known generally as corporate securities" which necessarily constitutes the predicate of the decisions in the other lower courts and explains bonds and debentures as exemplifying that general class of instruments, but rather some unexpressed concept of bonds and debentures according to such standards as may be found outside the statute. We believe there is no indication whatever in the statute that Congress intended to leave the question of taxability of corporate instruments to be determined by the question whether and to what extent they resemble bonds or debentures according to standards as variable, vague and elusive as those upon which this lower court depended.

At the bottom of the conflict created by the decision of the lower court in this case lies a dispute

over the meaning of the words "bonds, debentures or certificates of indebtedness" as taxable instruments and their relation to the remainder of the sentence comprising Schedule A1. The basic question to be determined from the language of Schedule A1 is whether, when it employed those words, Congress intended to refer to instruments somehow distinguishable, according to unexpressed concepts or connotations, from corporate instruments issued with interest coupons or in registered form and thereby identified as corporate securities, or whether, as petitioner claims, "bonds, debentures or certificates of indebtedness" are species of the genus "corporate securities" identified in the same sentence as instruments issued with coupons or in registered form, be they characterized as bonds or by any other name, and they therefore typify the class of instruments known as corporate securities.

The question whether instruments issued without coupons or registration are bonds or debentures, within the unexpressed meaning of those words standing by themselves and shorn of any contextual meaning contributed to them by the remainder of the sentence, is not pertinent to their taxability under this statute unless Congress can be said to have referred to bonds and debentures as categories of taxable corporate instruments separate and distinct from all instruments which, however termed, possess the characteristics of interest coupons or registered form identified with corporate securities. The imposition of a tax on corporate instruments as bonds or debentures even though issued without coupons or registration necessarily involves the assumption that bonds and debentures are not corporate securities; but if Schedule A1 were construed by reading

bonds and debentures as coordinates of notes or any other instruments, however termed, issued by a corporation with interest coupons or in registered form, the determinative factor would be, not whether they are bonds or debentures or notes, but whether, whatever they may be termed, they are issued with coupons or in registered form and are thus identified as corporate securities. Thus, the lower court conceded that if "the statutory phrase 'issued by any corporation with interest coupons or in registered form' qualifies all the preceding words in the section and not merely" the words "all instruments however termed" immediately preceding it, "the decision below should be affirmed despite our holding that these 'notes' were debentures for they would not be taxable debentures within the statute because they were issued neither with interest coupons nor in registered form".

The lower court adopted the Government's contention that Schedule A1 is to be construed as dividing taxable corporate instruments into two independent categories, one of which comprises "bonds, debentures or certificates of indebtedness" upon which, without any definition, the statute imposes the tax regardless of the fact that they are not issued with interest coupons or in registered form, and the other comprising "all instruments however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities", and as meaning, therefore, that bonds and debentures are not included among the instruments known generally as corporate securities. The consequence is that, if corporate instruments which could not be taxed under the second category, because they are issued without interest coupons or registration, fit the court's

conception of debentures according to standards other than those specified in the statute, they become taxable even though issued without coupons or registration.

Petitioner submits that the construction adopted by the lower court is unjustifiable and results in the taxability of corporate instruments which were not intended to be taxed, because they are not instruments issued with coupons or in registered form, and which for the same reason would not be taxed under previous decisions. The intention to tax instruments which, by whatever name they might be called, comprise that classification of instruments identified as issued with coupons or in registered form and known as corporate securities so clearly emerges from and dominates the scheme and meaning of Schedule A1 as to make it evident that bonds and debentures represent types of all instruments possessing the designated characteristics identified with instruments therein intended to be taxed.

This view of the language is significantly illuminated and analogously demonstrated in several other provisions of the Internal Revenue Code.* Under our construction of Schedule A1, bonds and debentures bear the same coordinate relation to other "instruments issued by any corporation with interest coupons or in registered form, known generally as corporate securities" that they explicitly and expressly possess, for example, in Sec. 23 (k), where the Code, in dealing with allowable deductions from gross income for securities which become worthless and are capital assets, provides under (3) that "the term

* The Internal Revenue Code incorporates the stamp tax under discussion in section 1801. There, the original caption heading of "Bonds of indebtedness" now refers to the instruments affected by the tax as "Bonds, etc."

'securities' means bonds, debentures, notes, or certificates, or other evidences of indebtedness, issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form", and under (5) in the same section, that "Bonds, debentures, notes or certificates, or other evidences of indebtedness issued with interest coupons or in registered form by any corporation affiliated with the taxpayer shall not be deemed capital assets" for that purpose.

Again, under the heading of "Retirement of Bonds, etc." Sec. 117 (f) of the Code provides that "For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates of indebtedness issued by a corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor". Under the heading "Bond, etc., Losses of Banks", Sec. 117 (i) deals with the question of capital assets in the case of a bank's sale or exchange "of bonds, debentures, notes, or certificates, or other evidences of indebtedness issued by any corporation (including one issued by a government or political subdivision thereof) with interest coupons or in registered form".

Those provisions bear eloquent and convincing testimony to the fact that Congress conceived of and referred to bonds, debentures and certificates of indebtedness as species of all instruments issued by any corporation with interest coupons or in registered form, on a par with notes or any other similar instruments similarly issued, and that in the more modern enactment it made expressly clear that conception of bonds and debentures for which we claim Schedule A1 stands.

The lower court, in rejecting the construction advocated there by the petitioner, was impressed by the fact that prior to 1918 the words "bonds, debentures or certificates of indebtedness" constituted the only identification of instruments subject to the tax under Schedule A1, and by the fact that the language of that portion of the statute was then extended by the addition of the words, which constitute part of the 1926 statute under which this case arises, "and all instruments however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities". The conclusion, that "this change was not to restrict taxation but was to add to what was already taxable all other instruments generally known as corporate securities", begs the question involved in the process of construing Schedule A1 for the purpose of determining the present meaning of the words "bonds, debentures or certificates of indebtedness" in the light of their meaning when they stood alone in that section. The lower court does so by erroneously and categorically assuming that corporate instruments were taxable as "bonds, debentures or certificates of indebtedness" under Schedule A1 prior to 1918 "whether or not issued in registered form or with coupons attached". We contend that that assumption is without foundation and that a sound construction of the language makes for the opposite conclusion.

It is submitted that the key to that situation is to be found in the fact that, during the time when bonds and debentures were the only types of instruments specified in Schedule A1, promissory notes were specifically and separately taxed in another section of the statute. It seems to the petitioner that the distinction, for tax purposes, between the promissory

notes taxed in one section and the bonds or debentures taxed separately in Schedule A1 was not, as in the nature of things it could not be, any element of similarity between the two. The distinction, we think, resided in some attributes or characteristics which were associated with bonds or debentures, but not with promissory notes, and which were implicit in the use of "bonds, debentures or certificates of indebtedness" as words of art. It seems clear that the result of the addition of the rest of the sentence of which Schedule A1 now consists, at a time when promissory notes continued to be separately taxable, was to clarify and sharpen the difference between promissory notes and the separate classification of bonds, by identifying those characteristics of bonds, as well as of any other instruments taxed under Schedule A1, which had previously been implicit in the designation of bonds and debentures as words of art, namely, interest coupons or registered form.

Viewed in that light and in harmony with the other lower court decisions, corporate instruments are taxable under Schedule A1, whether they are dubbed bonds, debentures, notes or by any other name, if and when they are identifiable as corporate securities by reason of being issued with interest coupons or in registered form. Congress made this undeniably plain in Sec. 23 (k) of the Internal Revenue Code by classifying bonds and debentures with notes or any other evidences of indebtedness issued by a corporation with interest coupons or in registered form.

If the construction advocated by the petitioner is sound, there is no room in the statute for taxing corporate instruments issued without interest coupons or registration merely because they are long-term instruments, or because they otherwise resemble

whatever instruments may be deemed to be debentures or bonds. As it stands, the statute takes the instruments as it finds them, and if it purports to tax long-term instruments at all, it taxes only those which, however termed, are issued with interest coupons or in registered form. If the tax is to be imposed on long-term corporate instruments issued, as these were, to a narrowly limited circle of lenders, without coupons or provisions for registration and without any trust indenture, in large denominations none of which was or could be less than $100,000, and under an agreement designed to militate against or effectively prevent the sort of public distribution associated with bonds or debentures or any other kind of corporate securities issued with coupons or in registered form, it is submitted that it is for Congress, and not for the courts, to do so.

2. Final settlement of the question of the application of the stamp tax statute to these corporate instruments is desirable because of the public interest in and the importance of the question presented, as well as to remove the confusion caused by the conflict in the decisions. This involves more than merely a matter of the taxability of instruments to which the statute has not hitherto been applied, although we do not mean to minimize its value as a case of first impression in that sense. Many corporations have issued instruments similar in most of the essential features to those involved here, on the supposition that they are not taxable for the reason, if for no other, that they were issued privately without coupons or registration. Petitioner has reason to believe also that the decision of the lower court in this case is likely to result in pro-

voking the Government into assessing a stamp tax on them on the ground that the statute applies similarly to them. This Court's settlement of the question whether instruments of this type are taxable as bonds or debentures even though issued without coupons or registration will be a source of great benefit to the administration of the statute in relation to this class of instruments as well as to the corporations concerned in it, either by nipping in the bud much unnecessary litigation if, at best, they are held not to be taxable, or by causing the issue in each case to be confined to a consideration of such other distinctions as may justify classification of the instruments as notes rather than bonds or debentures.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1947.